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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|-----------------|-------------|----------------------|---------------------|------------------|
| 09/838,809 | 04/20/2001 | Grant E. DuBois | 04286.00010 | 3526 |

22852 7590 12/03/2007
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EXAMINER

PADEN, CAROLYN A

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| ART UNIT | PAPER NUMBER |
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1794

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| MAIL DATE | DELIVERY MODE |
|-----------|---------------|

12/03/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

| | | | |
|------------------------------|-------------------------------|-------------------------------|--|
| Office Action Summary | Application No. 09/838,809 | Applicant(s) DUBOIS ET AL. | |
| | Examiner Carolyn A. Paden | Art Unit 1794 | |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 31 October 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) See Continuation Sheet is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 13, 14, 16, 17, 19, 20, 23, 26-28, 31, 34, 37, 40, 42, 43, 54-90, 97-102 and 106-128 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

Continuation of Disposition of Claims: Claims pending in the application are 13,14,16,17,19,20,23,26-28,31,34-37,40,42,43,54-90,97-102 and 106-128.

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on October 31, 2007 has been entered.

Claims 31, 34-37, 40, 42, 43, 54, 108-112, 115-126 are rejected under 35 U.S.C. 102(e) as being anticipated by Stefandl (2002/0136803) in view of Beyts and further in view of the admitted state of the prior art at paragraph 002 of applicants' specification or Frank (*5,806,550).

Stefandl discloses a freezer altering additive composition for use with commercial beverages. The composition is made from a 1).carbohydrate, 2)glycerol or propylene glycol and 3)a sugar alcohol such as sorbitol and erythritol (claim 1). The beverages are ready-to-drink compositions such as cola and cream soda (paragraph 33). Artificial sweeteners are also contemplated in the product. The freeze altering composition is simply added to the bottle and the bottle is tossed into the freezer (note sample D at paragraph 53). Although not specifically stated, cola and cream soda

are well known in the art to be carbonated beverages. The dispenser, in this case, is the bottle in the freezer. The inclusion of mineral salts is shown at page 5, on Table 1. The claims appear to differ from Stefandl in the recitation of the inclusion of a high intensity sweetener in the product and in the recitation that sugar alcohols are sweeteners. Beyts teaches that sucralose is a high intensity sweetener that has a synergistic relationship with sweet saccharides. Beyts also shows that sugar alcohols are sweeteners. Thus one of ordinary skill in the beverage art would have been able to modulate the sweetness of Stefandl by adjusting the amount and type of sweetener in the product. It is appreciated that the given freezing point of the product is not mentioned in the reference. But no difference is seen between the freezing point of the beverage of the claims and the freezing point of Stefandl.

The claims further appear to differ from Stefandl in the recitation of the use of a commercial dispenser instead of a home dispenser. Sample D of Stefandl provided a slushy product when the product was frozen (see page 4, paragraph 0054). So even if a commercial mixing device was not used in Stefandl, it is clear from the reference that this sample could have been process in a commercial mixer because it is slushy. Applicant admits

at paragraph 002 of his specification and in patent to Frank, cited in paragraph 032 of his specification that commercial mixers are known in the art for use with slushy beverages. It would have been obvious to process the beverage of Stefandl in a commercial mixing machine in order to provide the consumer with a slushy beverage when he or she is away from home.

Applicant addressed this rejection by providing a declaration under 35 USC 1.131. This declaration and data does not alone overcome the rejection because there are no high intensity sweeteners in the provided lab notebook pages. The notation in the column to "need to incl sweetness" does not provide evidence of reduction to practice.

Applicant indicated intent to file a document defining the numeric HF ingredients on the notebook page, but the information was not provided. Further the claims are not commensurate in scope with the ingredients in the laboratory notebook. Applicant urges that the flavor or sweetness is incidental to the important type of ice that is formed. This argument has been considered but it not persuasive. The whole idea of the invention is to obtain a low calorie carbonated dispenser beverage having the taste of a full calorie product. It is very well known in the art

that the sweetness level of low calorie sugars is different from sucrose. If the sweetness is not optimized, the beverage will not have desired taste quality. So it is the examiner's position that the taste of the product is essential to the development of the final product.

Applicants' arguments relating to the prior art rejection have been considered but are not sufficient to overcome the rejection. Examiner believes that the above rejection establishes a prima facie case for obviousness. Applicant urges that the prior art relied upon is not the same as the claimed composition but the rejection is an obviousness type rejection.

Claims 13, 14, 20, 23, 28, 31, 37, 54-90 and 106-127 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marulich (3,826,829) in view of Beyts (5,380,541)

Marulich discloses a slush beverage that is carbonated and is formed with water, sugars, polyols, flavor and coloring agents (see abstract). The use of a mechanical mixer in conjunction with slush beverages is disclosed as well known in the art as shown at column 1. At column 3, lines 52-62, the concept of using polyhydric alcohols, such as glycerol, sorbitol and

propylene glycol and combinations thereof is indicated. These polyhydric alcohols are termed "freezing point depressant material" at column 2, lines 52-55. Carbonation of the beverage is additionally shown at column 4, lines 1-4. Claim 13 appears to differ from Marulich in the recitation of the inclusion of a high potency non-caloric sweetener in the product and in the recitation of a low calorie sugar as a freezing point depressant. Beyts teaches the combination of sweeteners that include high intensity sweeteners. Beyts also shows that sorbitol is a sweetener (see Table at column 4, lines 36-49). Thus it would have been obvious at the time of applicants' invention to utilize the high intensity sweetener of Beyts to modify the sweetness of Marulich while maintaining a beverage with a desired depress freezing point. It is appreciated that "salt" is not included but to utilize salt as a flavor in Marulich would have been an obvious matter of choice with regard to the particular flavor that is desired in the product.

Applicants' arguments relating to the prior art rejection have been considered but are not sufficient to overcome the rejection. Examiner believes that the above rejection establishes a prima facie case for obviousness. Applicant urges that the prior art relied upon is not the

same as the claimed composition but the rejection is an obviousness type rejection.

Claims 16, 17, 26, 34, 40, 42 and 43 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marulich in view of Beyts as applied to the rejected claims above, and further in view of Cole for reasons of record.

Marulich discloses a slush beverage that is carbonated and is formed with water, sugars, polyols, flavor and coloring agents (see abstract). At column 3, lines 52-62, the concept of using polyhydric alcohols, such as glycerol, sorbitol and propylene glycol and combinations thereof is indicated. These polyhydric alcohols are termed "freezing point depressant material" at column 2, lines 52-55. Carbonation of the beverage is additionally shown at column 4, lines 1-4. Claim 13 appears to differ from Marulich in the recitation of the inclusion of a high potency non-caloric sweetener in the product. Claim 16 appears to differ from Marulich in the recitation that the low calorie sugars are freezing point depressants. Beyts teaches the combination of sweeteners that include high intensity

sweeteners. Beyts also shows that sorbitol is a sweetener (see Table at column 4, lines 36-49). Cole teaches that saccharides and sugar alcohols are well known to depress the freezing point of edible formulations (column 1, lines 21-35). Thus it would have been obvious at the time of applicants' invention to utilize the high intensity sweetener of Beyts to modify the sweetness of Marulich while maintaining a beverage with a desired depress freezing point.

Claims 19, 27 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marulich in view of Beyts and further in view of Cole as applied to the rejected claims above, and further in view of DeCock for reasons of record.

The claims appear to differ from Marulich in view of Beyts and further in view of Cole in the recitation that erythritol is a sugar alcohol. This evidence is provided by De Cock (column 1, lines 21-35). Thus with the references before him, one of ordinary skill in the art would have recognized that the polyhydric alcohols of Marulich included the sugar alcohols of Cole and the erythritol of deCock as a suggested freezing point depressant.

Claims 97-102 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marulich in view of Beyts and further in view of Cole as applied to the claims rejected above, and further in view of Anderson for reasons of record.

The claims appear to differ from Marulich in the use of tagatose. Anderson discloses that tagatose is a well-known non-caloric sweetener that can be used in beverages and also has synergistic sweetening when combined with other non-caloric sweeteners. It would have been obvious at the time of applicants' invention to utilize tagatose as a non-caloric sweetener in the composition of Marulich in order to provide sufficient sweetness to the product without adding a lot of calories.


This is a Continued Examination of applicant's earlier Application No. 09/838809. All claims are drawn to the same invention claimed in the earlier application and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the earlier application. Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action in this case. See MPEP § 706.07(b). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no, however, event will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached by dialing 571-272-1700, art unit 1794. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


CAROLYN PADEN 11-30-07
PRIMARY EXAMINER 1794